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February 26, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: January 28, 2004

Case No.: TIA-0044

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

1/ See www.eh.doe.gov/advocacy.

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that her husband worked at the DOE's Oak Ridge K-25, K-31 and K-33 plants in Oak Ridge, Tennessee from 1971 through 1982. During that time, he was a "Cascade Supervisor," a position that involved machinery repair, thereby exposing him to toxic chemicals used for machinery-cleaning. The applicant believes the exposure caused her husband's 1977 and 1982 heart attacks, his 1980 collapsed lung and a rash which he developed in 1977.

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the worker's heart attack, the Physician Panel found that the worker's "exposure to methylene chloride was minimal and not a factor in the development of this claimant's myocardial infarction."

2/ The Panel noted that an explanation for the worker's heart attack might be his history of smoking and hypertension.

The worker's skin rash was diagnosed as psoriasis or actinic keratosis. Two of the three panel members found that the rash was "not reflective of occupational dermatoses." 3/

The Panel reached a unanimous decision that exposure to a toxic substance was unrelated to the worker's collapsed lung. The Panel noted the individual's smoking history as the most probable cause of this condition.

2/ The Panel's determination on this illness was not unanimous. One Panel member believed that exposure to methylene chloride "suggests a possible association" with his myocardial infarction. For this reason, this physician decided that exposure was a contributing factor to the heart attacks. However, this Panel member used an incorrect standard in reaching his decision. As indicated above, the "at least as likely as not" standard is applicable in these cases. However, ultimately, it makes no difference here, since this Panel member was in the minority. We recommend that future Panel members review their determinations carefully in light of the correct standards.

3/ The third Panel member stated that "there was no evidence" of the worker's conditions as "being an occupational dermatitis, but . . . in the absence of patch testing or biopsy findings the possibility of an occupational . . . dermatitis cannot be ruled out." Based on this possibility, this Panel member decided that exposure to a toxic substance was a contributing factor to the skin condition. As discussed in Note 2 above, this standard is incorrect. Again, however, it makes no difference in the outcome of the case.

II. Analysis

The applicant seeks review of the Panel's determination.

A. Heart Attack

The applicant claims that the Panel incorrectly found that smoking and hypertension were the causes of her husband's heart attack. She claims that her husband did not take up smoking until after he had his first heart attack in 1977. She also contends that there is considerable evidence that the worker had normal blood pressure and that he has no history of hypertension. Thus, the applicant challenges the information that the Panel used to state what it believed were the most likely causes of the worker's heart condition. However, the Panel's speculation as to what might have caused the worker's heart attacks is not a proper basis for appeal in this case. The Panel determined, using the correct regulatory standard, that exposure to a toxic substance was not a cause of the worker's heart attacks. Thus, even if the Panel were incorrect in attributing the worker's heart attacks to smoking 4/ and hypertension 5/, this does not mean that it was incorrect in its determination that the disease was not caused by exposure to a toxic substance. In this regard, the applicant has pointed to no information in the record suggesting that the heart attacks were related to exposure to a toxic substance at a DOE facility. Consequently, there is no basis for any reversal or remand on this issue.

4/ The applicant argues that the worker did not begin to smoke until after his first heart attack in 1977. After reviewing the record, we recognize that there is some discrepant information on this point. However, overall, we believe that it is clear from the worker's own statements that he smoked at least 20 cigarettes per day beginning as early as 1960. *E.g.* Record at 139. In any event, as we indicate above, the worker's smoking habits are not the determinative factor.

5/ The applicant correctly points out that there is considerable information in the record to the effect that the worker did not suffer from hypertension. *E.g.*, Record at 154-65. However, as stated in Note 4 above, the Panel's speculation as to what might have been the cause of the worker's condition, even if incorrect, does not form a basis upon which to remand this case for further consideration.

B. Skin Rash

In her appeal, the applicant contends that there is a possibility that the worker's skin rash was caused by lupus. She also maintains that the Panel "could not possibly rule out any possibility of occupational dermatitis." As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is simply no evidence in the record to suggest that the Panel's conclusion was incorrect. The standard that the applicant proposes, whether there is any possibility that the disease was caused by toxic exposure, is not applicable in these cases. Moreover, the applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. Accordingly, we must reject this aspect of the appeal.

C. Collapsed Lung

The applicant believes that exposure to toxic substances cannot be ruled out as the cause for the collapsed lung. She points out that in their determination, the Panel members acknowledged that "pulmonary function tests showed only minimal changes indicative of chronic tobacco use." The applicant therefore challenges the Panel's conclusion that smoking was the cause of the worker's collapsed lung. As we pointed out in the discussion above regarding the worker's heart condition, the Panel used the correct standard in reaching its conclusion that the lung condition was not related to exposure to a toxic substance at the DOE facility. The fact that the Panel may not have correctly identified the actual cause of the condition claimed does not form the basis for a remand in this case.

The applicant has not shown any errors in the Panel's determination. She has not furnished any contrary information suggesting that the Panel erred. She has not provided, for example, a diagnosis from the worker's own physician indicating that his conditions were caused by exposure to a toxic substance at a DOE site. See, *Worker Appeal* (TIA-0029), 28 DOE ¶ 80,303 (October 1, 2003).

The applicant's belief, with nothing more, is not convincing. It does not establish any deficiency or error in the Panel's determination.

Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0044 be, and hereby is, denied.
- (2) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 26, 2004